Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion dated Dec. 6, 1996, as amended Jan. 3, 1997)	1a
Appendix B (court of appeals' opinion dated Sept. 29, 1995, as amended Nov. 1, 1995)	41a
Appendix C (court of appeals' order dated Jan. 25, 1996)	75a
Appendix D (district court's opinion dated Mar. 30, 1994)	77a
Appendix E (FEC certification and statement of reasons)	95a

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEE

[Argued May 8, 1996]
[Decided Dec. 6, 1996]
[As Amended Jan. 3, 1997]

OPINION

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges, and BUCKLEY,* Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge SENTELLE.

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* At the time of en banc argument, Judge Buckley was a circuit judge in active service. He assumed senior status on September 1, 1996.

SILBERMAN, Circuit Judge:

Appellants challenge the district court's grant of summary judgment. The court affirmed the Federal Election Commission's dismissal of appellants' administrative complaint, which had alleged that the American Israel Public Affairs Committee (AIPAC) was a "political committee" subject to relevant reporting and disclosure requirements and contribution and expenditure limits of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-55 (1994 & Supp.1996). The court thought reasonable the Commission's definition of "political committee" as including only organizations that, in addition to meeting the statutory $1,000 expenditure threshold, have as their major purpose campaign related activity. We reverse.

I.

James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker (collectively appellants) are former ambassadors, congressmen, or government officials. They are registered voters and "politically active persons who . . . oppose AIPAC views on U.S. foreign policy in the Middle East" and who "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public." Paul Findley is a former congressman from Illinois "widely perceived to be friendly to the Arab cause"; AIPAC is alleged to have helped to defeat him in the 1982 congressional election. AIPAC is an incorporated, tax-exempt organization with approximately 50,000 supporters nationwide and a budget of about $10 million (as of 1989) that lobbies Congress and the executive branch for military and economic aid to

Israel and generally encourages close relations with Israel.

Appellants filed a complaint with the FEC in 1989, alleging *inter alia* that AIPAC had made campaign contributions and expenditures in excess of $1,000 and was therefore a political committee. A political committee is defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). "Expenditure" is defined in turn as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election." 2 U.S.C. § 431(9)(A)(i). Expenditures have been classified by caselaw and FEC interpretation to include three categories: independent expenditures not connected to any candidate, coordinated expenditures made in cooperation or consultation with a candidate, and direct contributions to a candidate. Once designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200. *See* 2 U.S.C. § 434(b)(2)-(5). And it is prohibited from contributing more than $1,000 to any candidate. See 2 U.S.C. § 441a(a). Appellants claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meet-

ings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates. Since these activities cost more than $1,000, AIPAC's failure to register as a political committee and comply with the requirements was a violation of the Act. *See* 2 U.S.C. §§ 433; 434(a)(1), (b); 441a(1), (2).

The General Counsel investigated the allegations and issued a report in 1992, making recommendations that were subsequently adopted by the Commission. The Commission determined that AIPAC likely had made campaign contributions exceeding the $1,000 threshold, but concluded that there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose. The campaign activities were only conducted in support of its lobbying activities. No precedent was cited or rationale given, in the General Counsel's brief, his report, or the Commission's order, to support this interpretation of the statutory definition of "political committee." The Commission did find probable cause to believe that AIPAC violated § 441b, which generally prohibits campaign expenditures and contributions by corporations, but voted to take no action because it thought it was a close question whether AIPAC's expenditures were made in the course of communicating with its members, an exception to § 441b's prohibition. It therefore dismissed the complaint and closed the case.

Appellants sued in the district court pursuant to § 437g(a)(8), an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings, *cf. Heckler v. Chaney*, 470 U.S. 821, 831, 105

S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985), challenging the Commission's interpretation of the term "political committee."[1] The Commission responded that the Supreme Court, concerned with the Act's burdens on political speech, had narrowed the term's statutory definition in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (MCFL). The Commission read these opinions—at least it so asserted in district court—as holding that an organization is a political committee only if its major purpose is the influencing of federal elections. Therefore, notwithstanding the plain language, the Commission claimed it interpreted the statute at least reasonably.

The district court agreed. Combining the Supreme Court's opinions (and our decision in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981)), with *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) deference, the court concluded that the Commission's construction was "reasonable." A divided panel of this court affirmed. The FEC had not originally challenged appellants' standing, but the panel sua sponte asked the parties to brief the issue. The panel majority concluded that appellants had suffered an "informa-

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[1] Appellants also contest some of the Commission's factual conclusions. In particular, they question the Commission's determination that there was a lack of credible evidence concerning AIPAC's involvement in providing assistance to the opponent of Paul Findley—a complainant here—in a 1982 congressional election.

tional injury" as voters and members of the public; the lack of information on AIPAC's contributions and expenditures, caused by the FEC's action, limited the information available to them as voters and impaired their ability to influence and inform the public and policymakers. The dissent thought appellants' injury was based instead on their competitive lobbying position vis-a-vis AIPAC. We determined to rehear the case en banc and directed the parties to focus on standing as well as the merits.

II.

The Commission, as it did before the panel (after it was asked to address standing), challenges the court's jurisdiction. The Commission contends that neither the theories adopted by the panel judges nor appellants' somewhat different contentions satisfy Article III standing requirements. Appellants—whether as voters or political competitors (except for Findley whose standing as a candidate the Commission does not challenge[2])—not only lack injury-in-fact, their alleged injury was not caused by the Commission's actions and it is not redressable by this court's order. It is further argued that even if appellants make out Article III standing, they are not parties "aggrieved" under the statute and so lack prudential standing.

We take up first appellants' standing as voters. We have recognized in our "informational standing" cases that a party may be entitled to sue in federal court to force the government to provide information

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[2] The Commission does not explain why, if Findley does have standing, the rest of its standing objections are nonetheless determinative, because we would still be obliged to reach the merits.

to the public (and thereby to it) if the government's failure to provide or cause others to provide that particular information specially affects that party. But this type of injury is narrowly defined; the failure must impinge on the plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact. Compare *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973) (the Atomic Energy Commission's decision not to provide an Environmental Impact Statement (EIS) on a reactor program established Article III injury because the Institute's main function was to distribute such information to the public), and *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (Article III injury where new government regulations restricting the availability of information on services for the elderly impaired AASC's ability to provide information, counseling, and referral services for its senior citizen members), *vacated on other grounds*, 494 U.S. 1001, 110 S.Ct. 1329, 108 L.Ed.2d 469 (1990), with *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122-23 (D.C. Cir. 1990) (no informational injury where organization failed to show how the NHTSA's decision not to issue an EIS significantly diminished its ability to educate and inform the public about highway safety). Appellants' alleged injury as voters does not seem to fit within the limited contours of our informational standing cases. They do assert that their injury is based on the FEC's failure to provide appellants, as voters, with certain information, but their injury does not depend on the character of their organizational activity but rather on the proposition that the deprivation of that information impedes their ability to

engage in a particular act guaranteed them in a democracy. They have been deprived of certain specific information that Congress thought voters needed to make an informed choice and therefore required "political committees," *inter alia*, to disclose.

Although Congress may not "create" an Article III injury that the federal judiciary would not recognize, anymore than Congress could amend the Constitution, see *United Transp. Union v. ICC*, 891 F.2d 908, 915-16 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3271, 111 L.Ed.2d 781 (1990); *Safir v. Dole*, 718 F.2d 475, 479 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389, 81 L.Ed.2d 347 (1984), Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 2145-46, 119 L.Ed.2d 351 (1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975)); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 1121, 71 L.Ed.2d 214 (1982). Such a legal right can be given to all persons in the country. In that event, any person whose individual right has been frustrated or interfered with has standing to sue, even though all other persons have the same right, without the claim being regarded as a generalized grievance. That is why anyone denied information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* (1994), has standing to sue regardless of his or her reasons

for suing. *Public Citizen v. FTC*, 869 F.2d 1541, 1548 & n. 13 (D.C. Cir. 1989).[3]

Appellants would analogize this case to a FOIA case; any and all voters, in their view, suffer injury-in-fact when the FEC fails to force a political committee to report its activities to the Commission, which then has an obligation under the statute to make such information available to the public. See 2 U.S.C. § 438(a)(4) (requiring Commission to make all information filed promptly available to the public). But Congress did not quite create a legal right in all individual voters to obtain that information either directly or indirectly. The mere denial of an attempt to gain information does not create a cognizable injury under the Act. An individual must file a complaint with the Commission, which is provided authority to enforce the requirement that political committees report their activities. Only parties aggrieved by the dismissal of a complaint are entitled to challenge in court the Commission's refusal to enforce. (Although under § 437g(a)(8)(C), if a court decision directing the Commission to act is ignored by the FEC, the complainant can actually sue the offending party directly.) This indicates that the statutory entitlement to information is not as categorical or direct as that of FOIA.[4]

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[3] The dissent's logic suggests that even such a claim is only a generalized grievance; otherwise, to use the dissent's phraseology, the dissent "ducks the consequences" of admitting that all Americans could sue. Dissent at 2.

[4] By contrast to FOIA, the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1994), does not provide a private right of action to enforce the EIS procedural requirements. To show standing, the litigant therefore must allege that he will be harmed by the underlying agency action contemplated,

While a voter's rights under the Act are not exactly analogous to FOIA, appellants do have a point, and it is a point that distinguishes this case somewhat from our informational standing cases. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 2564-65, 105 L.Ed.2d 377 (1989) (analogizing requests for access to information under the Federal Advisory Committee Act (FACA) to requests under FOIA). Congress clearly intended voters to have access to the information political committees were obliged to report. The whole theory of the statute is that voters are benefitted insofar as they can determine who is contributing what to whom. *See Buckley*, 424 U.S. at 66-67, 96 S.Ct. at 657 (disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," deters actual corruption and the appearance of corruption, and helps the public detect post-election *quid pro quos*). Although Congress cannot determine when someone has suffered Article III injury, we do not think it can be denied that this sort of information that Congress required disclosed aids voters, if and when they vote. If a party is denied information that will help it in making a transaction—and a vote can be

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and that if forced to prepare (and consider) an EIS, the agency might act differently. See *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n. 6 (9th Cir. 1995), *cert. denied*, — U.S. ——, 116 S.Ct. 698, 133 L.Ed.2d 655 (1996); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991). Thus, the lack of the information itself is not an injury. Here, the injury is closer to the FOIA model; the injury to the voter is the lack of the information itself, and the only underlying agency action is the failure to require disclosure.

thought of as a kind of transaction—that party is obviously injured in fact. We recognized as much in *Public Citizen*, 869 F.2d at 1546 & n. 7, where we determined that a group representing consumers had standing to challenge the FTC's regulations exempting from health warnings certain promotional items sold by manufacturers of smokeless tobacco. Those promotional items, a form of advertising, were designed to encourage the purchase of smokeless tobacco, and some of the plaintiffs' members and their families alleged that they used or may use those products without the statutorily required reminder of the dangers that consumption entails. We reasoned that such information would be of substantial value to the plaintiffs' members, and therefore they were injured because they were deprived of it at the time they purchased or used the product. *Id.*

Although admittedly registered voters—even the more limited subset of those who actually vote—is a very large group of Americans, we do not think it analytically sound to describe a lawsuit brought by affected registered voters as presenting only a generalized grievance. The term "generalized grievance" does not just refer to the number of persons who are allegedly injured; it refers to the diffuse and abstract nature of the injury. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (citizen and taxpayer challenge to membership of members of Congress in Armed Forces Reserves during Vietnam War presents generalized grievance); *see* also *Lujan v. Defenders of Wildlife*, 504 U.S. at 573-74, 112 S.Ct. at 2143-44. The number of potential plaintiffs matters not so long as each can assert a distinct, individual

injury. *See Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365-66, 31 L.Ed.2d 636 (1972); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). A voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury. As we understand our dissenting colleagues, they agree with the Commission that appellants are presenting a generalized grievance because it is information that they seek. Apparently if Congress provided that public or private employers were obliged to provide their employees free transportation to the polls, enforceable through an agency like the FEC, that would be a particularized right (except that according to Section B of their opinion it would not be redressable). We think the dissent is just incorrect in refusing to see information as a commodity of value.[5]

To be sure, it would not be enough for standing in this case for appellants to assert only that they were voters, for appellants would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted. But appellants can hardly be expected to allege that AIPAC made contributions in the elections in which they voted, for whether AIPAC made such contributions is precisely the information

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[5] Since the dissent concedes that all appellants would have standing if the information had been supplied to the FEC and then simply withheld, Dissent at 746-47, 745 n.2, it would appear that the dissent's only real objection to standing is redressability.

of which appellants claim they have been deprived. As the FEC found that AIPAC likely did contribute in excess of $1,000 in one year, and the FEC did not identify the elections to which these contributions were made, there is nothing to indicate that appellants did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee. Therefore we conclude that appellants have standing as affected voters. We thus need not resolve whether appellants also have standing as political competitors of AIPAC, or whether Mr. Findley—who was last a candidate in 1982, *see Golden v. Zwickler*, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (no controversy where it was unlikely that congressman would again be a candidate for Congress)—has standing as a candidate.

The Commission also questions the causal connection between its decision and appellants' injury, as well as causation's corollary in standing analysis—redressability. As best we understand the FEC's rather confusing argument,[6] its causation objection is primarily directed to appellants' alleged lobbying injury rather than their injury as voters. That the Commission does not make the argument vis-a-vis appellants' standing as voters is understandable because such a theory would stretch causation to its breaking point; no one would have standing to challenge the Commission's determination, or for that matter, many other administrative agency actions. It is only necessary for a voter to allege that his vote and others' votes may have been affected by the

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[6] Appellants did not, it should be noted, provide much help on the difficult standing issue in this case.

disclosure of information that a contrary FEC determination would have made available.

The Commission's argument that appellants lack standing because we cannot issue an order that redresses their injury—with which the dissent agrees—strikes us as a breathtaking attack on the legitimacy of virtually all judicial review of agency action. The Commission points out that it has enforcement discretion, so that even if we were to determine that its statutory interpretation of "political committee" is erroneous, it does not follow that AIPAC would be required to disclose the information a political committee must: the FEC might settle with AIPAC on terms that did not require disclosure. Yet all regulatory agencies enjoy some measure of enforcement discretion. If that factor were to mean that an agency's legal determination was not reviewable, that would virtually end judicial review of agency action. We rarely know when we entertain a case, say, challenging an agency's interpretation of a statute, whether the agency's ultimate action will be favorable to the petitioner or appellant. *See Public Citizen*, 491 U.S. at 450, 109 S.Ct. at 2564-65 (that FACA documents may not be disclosed pursuant to statutory exceptions no bar to redressability); *Competitive Enter. Instit.*, 901 F.2d at 118 ("[a] remand that would leave the agency free to exercise its discretion in a proper manner, then, could lead to agency action that would redress petitioners' injury") (emphasis added); *Foundation on Economic Trends v. Lyng*, 943 F.2d at 83 & n. 2 (plaintiff typically not required to show that the agency was likely to take a particular substantive action in response to EIS). Our job is limited to

correcting a legal error—if error is committed—in the agency decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 1577-78, 91 L.Ed. 1995 (1947). The error must, of course, be one upon which the agency decision rests, an analytical precondition to the agency action. If that is so, it has always been an acceptable feature of judicial review of agency action that a petitioner's "injury" is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning. *See id.*

Nor can it be relevant, as the dissent supposes, that AIPAC might not comply with the Commission's order. That too is always true when an agency's nonaction against a third party is challenged. In any event, under this very unusual statute appellants are not dependent on the Commission's compliance with our decision correcting the Commission's interpretation of the phrase "political committee." As we noted earlier, if the Commission fails to "conform" to our "declaration," the appellants, as the original complainant, may bring their own civil action to remedy the violation of law. 2 U.S.C. § 437g(a)(8)(C). It would appear under this provision that if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, as the dissent suggests could occur, appellants would be able to seek disclosure directly. This unique statutory provision then completely undermines the Commission's and the dissent's redressability argument—even on the argument's own terms.[7]

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[7] In an argument that seems to be based more on mootness than redressability, the Commission also contends that appellants' injury would not be redressed by a favorable decision of

Finally, the Commission challenges appellants' prudential standing, claiming they are not parties aggrieved within the meaning of the statute, which provides that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with the United States District Court for the District of Columbia." 2 U.S.C. § 437g(a)(8)(A). The Supreme Court, interpreting similar language in the Administrative Procedure Act permitting judicial review generally if a party is "aggrieved," has held that term obliges federal courts to determine whether, under the substantive statute, the party seeking judicial review is within the zone of interests. Thus

> [i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no

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this court because AIPAC is barred from making future contributions to candidates by another section of the statute, § 441b, which prohibits corporate contributions. This is a non sequitur; appellants claim they are injured because AIPAC was permitted to avoid registering as a political committee and disclosing its past receipts and expenditures. That disclosure of past activities would presumably affect voters in the future. If such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review. In this case, for example, it took well over two years for the Commission to make a probable cause determination.

> indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987) (citations omitted) (emphasis added). Here, although the governing judicial review provision is included within the substantive statute, the same test logically should apply to determine whether a party challenging a Commission decision qualifies. But why would appellants not meet that test? The Commission's argument again is rather convoluted. It concedes, as it surely must, that the statute is designed primarily to aid voters, *Buckley*, 424 U.S. at 66-67, 96 S.Ct. at 657-58; therefore, it seems strange to even suggest that a voter would not have prudential standing. Yet the Commission asserts that "a pure voter's interest [is] too generalized to satisfy Article III or the zone of interests test" (emphasis added). We have already explained why we do not regard appellants' case as presenting a "generalized grievance." *See supra* pp. 737-38. And although the numbers of persons who might be eligible to sue might well bear on a determination as to whether Congress intended such a broad class of potential litigants, in this case it is apparent that Congress treated the broad class—voters—as the core beneficiaries of the statute. Therefore, we simply cannot glean any congressional intent to preclude members of that class from suing—so long as they filed a complaint with the FEC that was dismissed.[8]

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[8] It is not clear from the Commission's argument who would have prudential standing. Although the fact that no one would have standing to sue is not a reason to find Article III standing, *Schlesinger v. Reservists*, 418 U.S. at 227, 94 S.Ct. at

The Commission contends that "aggrieved" must be read to require a more direct connection to or a greater stake in the conduct in question, call it "voter plus" status. But appellants are not merely voters; they are voters who have filed a complaint with the Commission that has been dismissed. In sum, appellants' interests as voters clearly are not "so marginally related to or inconsistent with the purposes implicit in the statute," *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757, for it to be unreasonable to assume Congress intended to permit them to sue.

III.

Section 431(4)(A) defines "political committee" solely in terms of "expenditures" and "contributions": a political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." The FEC concedes that this language sets unambiguous requirements for classification as a political committee. But it asserts that Supreme Court decisions have narrowed the reach of the statutory language in response to First Amendment concerns. The FEC relies on language in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, in claiming that an organization should only be classified as a political committee if, in addition to exceeding the $1,000

2935, the same cannot be said for prudential standing. Where Congress has created a right to seek judicial review, see 2 U.S.C. § 437g(a)(8), it cannot be the case that Congress intended that right to extend to no one.

expenditure limit, the organization's major purpose is the nomination or election of a candidate or the organization is controlled by a political candidate.

At minimum, the Commission argues, these cases created an ambiguity in the statutory definition of "political committee" so that the Commission's subsequent interpretation of the term is owed deference—and passes muster—under Chevron Step II. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When Congress is silent or ambiguous, the Commission reminds us, an agency's construction is owed deference if it is permissible. That the ambiguity here arose from Supreme Court interpretation does not, it is argued, affect this general rule of deference; the agency still has discretion to fill the interpretive "gap." According to the FEC, the gap to be addressed here is not whether the Court established a major purpose test as a generic definition of political committee (which the Commission assumes), but how such a test is to be implemented. Since the Court did not decide the types of organizations that are within its "definition" of political committee, whether contributions and expenditures are treated the same, and so on, the Commission has discretion to flesh out the concept, consistent with Supreme Court precedent.

We think the FEC's plea for deference is doctrinally misconceived. It is undisputed that the statutory language is not in issue, but only the limitation—or really the extent of the limitation—put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any

other principle. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with *Chevron*'s basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications or legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence. *See Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

In sum, since it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted "ambiguity" only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions. In that regard, we think the Commission misstates the interpretation issue. As we noted, it casts the question as how the major purpose test applies, as if the test were set forth categorically. But as we see the key question, it is whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated.

Turning to the Supreme Court's decisions, the Court did state in *Buckley* that the term political committee "need only encompass organizations that

are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79, 96 S.Ct. at 663 (emphasis added). And this notion was repeated in *MCFL*: "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n. 6, 107 S.Ct. at 625 n. 6 (quoting *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663). Although *MCFL* apparently was not charged with violating the political committee provisions, the Court in dicta said that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630.

While the above language in *Buckley* and *MCFL* can literally be read to support the FEC's position, both cases focused on the constitutional concerns raised by independent expenditures, which are not coordinated with or made in consultation with any candidate, as distinguished from coordinated expenditures or direct contributions. *See Colorado Republican Fed. Campaign Comm. v. FEC*, — U.S. ——, — — - ——, 116 S.Ct. 2309, 2315-16, 135 L.Ed.2d 795 (1996). Independent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption. *Buckley*, 424 U.S. at 19-23, 78-81, 96 S.Ct. at 634-37, 663-64; *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29. They raise more serious First Amendment concerns because it is difficult to deter-

mine when an expenditure is independent, and regulation therefore risks chilling protected speech. For that reason, in *Buckley* the Supreme Court determined that expenditure limits are more likely to violate the First Amendment because they place substantial and direct restrictions on the ability to engage in political speech. *See* 424 U.S. at 39-59, 96 S.Ct. at 644-54. Limitations on contributions or coordinated expenditures, on the other hand, were thought to raise fewer constitutional concerns because they serve the basic governmental interest of protecting the electoral process while only marginally restricting political debate and discussion. *See Colorado Republican Fed. Campaign Comm.*, — U.S. at ——, 116 S.Ct. at 2315; *Buckley*, 424 U.S. at 28, 96 S.Ct. at 639 (such limits "focus[ ] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *see also Buckley*, 424 U.S. at 28, 30, 36, 96 S.Ct. at 639, 640, 643.

To support its interpretation, the FEC points to *Buckley*'s discussion of § 434(e), which imposes disclosure requirements on "[e]very person (other than a political committee or candidate)" making contributions or expenditures exceeding $100.[9] "Contributions"—when defined as direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the

[9] Section 434(e) has subsequently been amended: "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year" shall be subject to certain reporting and disclosure requirements. 2 U.S.C. § 434(c)(1).

cooperation or consent of a candidate—were determined to "have a sufficiently close relationship to the goals of the Act," and therefore limits on them are constitutional. *Id.* at 78, 96 S.Ct. at 663. The Court noted that the meaning of "expenditure," however, posed line-drawing difficulties because it posed the danger of "encompassing both issue discussion and advocacy of a political result." *Id.* at 79, 96 S.Ct. at 663. Therefore, the reach of § 434(e) was limited by "construe[ing] 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. at 663. In the midst of this analysis of the scope of "expenditures" under § 434(e), the Court noted in dicta that the meaning of political committee, because it was defined solely in terms of contributions and expenditures, posed the same line-drawing problem. The Court's language that apparently refers to the major purpose of an organization, given this context, does not really support the Commission's interpretation:

> To fulfill the purposes of [FECA, political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79, 96 S.Ct. at 663 (emphases added). We think the better interpretation of this language, as appel-

lants suggest, is that when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition. The Court clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a "major purpose" test seem to implicate only the former.

As we noted, certain language in *MCFL* can also be read to support the FEC's position, but the Court was again addressing First Amendment problems with the regulation of independent expenditures. The Court held that § 441b, which prohibits corporate contributions or expenditures "in connection with any election," was unconstitutional as applied to *MCFL* because the Act's reporting and disclosure requirements might discourage protected political speech of such advocacy groups. *See* 479 U.S. at 253-56, 107 S.Ct. at 625-27. Still, the Court's analysis clearly distinguished contributions and expenditures: "should *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663) (emphasis added). ~~As in~~ *Buckley*, this language can be read as merely creating a presumption that certain organizations' expenditures are "made . . . for the purpose of influencing any election"; an organization devoted almost entirely to campaign spending could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it. As in *Buckley*, the underlying concern is that congressional regulation, in its effort to achieve full disclosure, may impermissibly discourage protected independent expenditures. In short, the Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign contributions (or coordinated expenditures) exceeding the statutory limits.[10]

The FEC further contends, however, that we endorsed its "major purpose" test in Machinists Non-Partisan Political League, 655 F.2d at 392. In Machinists, we held that "draft groups" that promoted the acceptance of particular individuals prior to their actual nomination did not fall within the definition of "political committee" because the expenditures and contributions were not made to a "candidate." *Id.* at 396. Our decision was based in large part on Congress' intent to exclude draft groups from the definition of political committee. *See id.* at 394-96 (Congress failed to respond to the FEC's repeated requests to amend the Act to apply contribution limits to draft groups). And our analysis, contrary to the FEC's suggestion, supports appellants' interpretation of the major purpose test. We

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[10] The Commission makes no claim that AIPAC actually qualifies for the *MCFL* constitutional exemption, which requires that the organization be engaged in issue advocacy, that it not accept contributions from labor unions or corporations, and that it have no shareholders or other persons with a claim on its assets who would have a disincentive to withdraw if they disagreed with its political positions. 479 U.S. at 264, 107 S.Ct. at 631. Indeed, the General Counsel's brief advised that AIPAC did not qualify because it apparently receives certain contributions from corporations.

did quote *Buckley*'s language—noted above to be equivocal—on an organization's major purpose. *Id.* at 392. But we concluded that *Buckley* had endorsed the "narrowing construction" of "political committee" developed in *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir.1972) (*NCFI*), and *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041 (D. D.C. 1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975), and we noted that "[a]ll three of these decisions recognized the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate,' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393 (emphasis added). Our use of the word "activities"—while admittedly not free from ambiguity—indicates that, as appellants contend, it is the purpose of the organization's disbursements, not of the organization itself, that is relevant.[11]

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[11] Appellants argue that the major purpose test is properly employed to determine whether an organization's independent disbursements constitute "expenditures" within the meaning of § 431(9)(A)(i), such that they count toward the $1,000 limit defining political committee status. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041. We do not for purposes of this appeal have to determine finally whether appellants' version of the test is the only possible one. But we reject the FEC's contention that appellants' interpretation of the major purpose test is redundant because the statute already requires that an expenditure be "made for the purpose of influencing an election." A "major purpose" test was developed at least partly in order to construe this definition narrowly so as to avoid constitutional concerns. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041; *cf. Buckley*, 424 U.S. at 76-78, 96 S.Ct. at 662-63.

The FEC's interpretation of "political committee" would, as appellants point out, allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not. This would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of "political committee." That such an organization, as the Commission emphasizes, may be limited by other statutory provisions as well—*e.g.*, § 441b's prohibition on corporate expenditures and § 434(c)'s restrictions on persons (defined in § 431(11) to include corporations) making independent election expenditures—is irrelevant. There is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive. As the Commission concedes, various statutory provisions impose different, if overlapping, limits and requirements on organizations; these differences represent the sound exercise of congressional judgment as to the various degrees of risk to the election process posed by certain activities.

The FEC assumes that this statutory language already had a precise meaning—under the control of a candidate or made with the consent or authorization of a candidate—which in fact *NCFI*, 469 F.2d at 1141, and *Buckley*, 424 U.S. at 40-42, 79, 80, sought to impose. Appellants' major purpose test thus can be seen not as a tautology but as a necessary judicial gloss on the statutory definition of expenditure.

The Commission seeks to minimize the implications of its interpretation by arguing that it has not yet resolved when an organization's spending becomes "a" major purpose that counts toward the "political committee" threshold.[12] But we think little of this suggested safety valve; the inevitable logic of the Commission's test is that the two organizations described above, spending precisely the same amount to influence federal elections and therefore presenting precisely the same threat of election corruption, will be treated differently. And if the Commission is truly considering a variable major purpose standard as applied to contributions—now it applies and now it does not—such discretion in itself raises First Amendment concerns. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-33, 112 S.Ct. 2395, 2401-03, 120 L.Ed.2d 101 (1992)

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[12] The Commission nevertheless claims that it has consistently implemented its interpretation of the statute post-*Buckley*. The FEC points to two of its recent decisions, post-dating this litigation, to show its adherence to the major purpose test. *See* AO 1995-11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6148-49 (1995); AO 1994-25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6125. But as appellants note, earlier FEC advisory opinions—in the nearly 20 years after *Buckley* and 10 after *MCFL*—did not articulate a major purpose test; they instead appear to examine whether particular expenditures exceeded the $1,000 limit, without regard to the percentage of spending that was campaign related or to the organization's major purpose. *See, e.g.*, AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5426; AO 1988-22, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5932. We by no means think the FEC's apparent change of position dispositive, but it does undermine the Commission's insistence that the Supreme Court clearly imposed this test, particularly given its failure to explain that view in its Order in this case.

(First Amendment prohibits investing official in licensing scheme with discretion). Moreover, if it relied on such a standard, the Commission should have determined more precisely the level of AIPAC's campaign spending and should have explained why that funding was not "a" major purpose.[13]

There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further action not inconsistent with this opinion.

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[13] The FEC's decisions on how and to what extent to investigate a complaint, while reviewable, command substantial deference. *See FEC v. Rose*, 806 F.2d 1081, 1091 (D.C.Cir. 1986). However, the investigation here likely would have been insufficient to support a finding that AIPAC's contributions were not "a" major purpose. The Commission asserts in its brief, without citation to the record, that "the evidence indicated that AIPAC's campaign spending never even reached one percent of its annual budget," but that already approaches $100,000 (emphasis added). In any event, given our resolution of the case, the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee.

* * * *

The judgment of the district court is

Reversed.

SENTELLE, Circuit Judge, dissenting, with whom Circuit Judge HENDERSON joins:

The standing doctrine "requires that anyone who would invoke the aid of the courts in resolving a complaint must allege, at a minimum, an actual or imminent injury personal to the plaintiff that is fairly traceable to the defendant's conduct and that is likely to be redressed by requested relief." *Louisiana Env. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996). For the reasons that follow, I would hold that appellants have not established these minimum requirements.

A. Informational Standing

When this matter was before the panel, I wrote for the majority finding standing based on "informational injuries." I concluded at the time, and believe now, that the panel was compelled by circuit precedent to reach that result. *See, e.g., Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (R.B. Ginsburg, J., concurring) (law of the circuit "'whether or not [it] is correct' . . . binds us unless and until overturned by the court en banc or by Higher Authority."). Because circuit precedent dictated that an organization can establish standing by alleging that a governmental action restricted the flow of information disseminated by the organization in its regular activities, *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986), I thought the panel had no choice on the issue. Because the en banc court is not so restricted but is

empowered to depart from circuit precedent, if I were writing for the majority today, I would take this occasion to modify circuit law on informational standing and would not find informational standing on the present record.

The majority, rightly, rejects informational standing for plaintiffs in this case. I applaud the majority's decision to treat the concept as a narrow one. I agree with the majority that a party cannot successfully claim informational standing where he cannot establish that "the government's failure to provide or cause others to provide" information "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible. . . ." Maj. Op. at 735 (citing *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973)). While the majority is not clear on why appellants' complaint differs from that of, for example, the organization for the elderly in *Action Alliance*, it at least seems to be attempting to narrow the concept of informational standing by holding that the "[a]ppellants' alleged injury as voters does not seem to fit within the limited contours of" informational standing precedent. Maj. Op. at 736. But the majority retains the fundamental error which has infected our informational standing jurisprudence when it affords standing to the plaintiffs/appellants as voters, on a rationale indistinguishable from informational standing. Indeed, it recites in informational terms that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids

are due, would suffer a particularized injury even if all other bidders also suffered an injury." Maj. Op. at 737 (emphasis added). In setting forth this analysis, the majority admits that the class of "registered voters—even the more limited subset of those who actually vote—is a very large group of Americans. . . ."[1] *Id.* at 737. But the majority ducks the consequences of this admission.

The Supreme Court expressly held in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* at 499, 95 S.Ct. at 2205 (*citing, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). The majority has not explained why the claimed lack of information for the entire class of voters (or potential voters) does not fall squarely within this precept. The attempted distinction that " 'generalized grievance' does not just refer to the number of persons who are allegedly injured [but] refers to the diffuse and abstract nature of the injury," Maj. Op. at 737, gets nowhere without an explanation as to why this is not a diffuse and abstract injury.[2] The comparison to the bidder de-

[1] It is not at all clear why the injury is limited to the class of registered voters as opposed to all potential voters as the information, if useful, could be as likely to warrant registration and voting as voting in a particular direction.

[2] Contrary to the majority's assertion, Maj. Op. at 736 n.3, our logic does not suggest that a claim for information under FOIA is only a generalized grievance. FOIA gives everyone a right to information. A FOIA injury, therefore, is not a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. It is a particularized injury personal to the disappointed requester, and *Warth*'s holding is therefore not implicated. Similarly, if the FEC had the information appellants want and refused to provide it, they might have a cognizable injury affording them standing.

prived of information accomplishes even less. Chief Justice Burger in *Schlesinger v. Reservists* made that comparison for us. "It is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury . . . but it is another matter to allow a citizen to call on the courts to resolve abstract questions." *Schlesinger*, 418 U.S. at 223, 94 S.Ct. at 2933 (footnote omitted). Cases in this second category, Chief Justice Burger noted, raise "only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant." *Id.* This is the flaw of the new form of standing—voter standing—that the majority creates today. It, like the broad definition of informational standing, relies on a diffuse rather than a particularized injury.

I would not only reject informational standing as a basis for this claim, but, because I see no basis for distinction between this case and, for example, *Action Alliance*, I would reexamine the entire concept of informational standing as it now exists in this circuit, and I would reject it. I do not find within the majority opinion any justification for our precedent on that subject. The majority's creation violates the principle that a plaintiff generally may not rely for a claimed injury on a mere ideological interest, *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 112

(D.C. Cir. 1990), by perpetuating the notion that an organization has standing where the alleged injury is that the government's failure to provide information to the organization "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible." Maj. Op. at 735 (*citing Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973)). While the Supreme Court's standing jurisprudence may not always be pellucid, the Court has left no doubt that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

As the Court noted, if a special interest in a subject were enough to provide the floor for standing to a long-interested organization, there would be no objective basis for barring the same theory of standing to any other organization no matter how small or new, or to an individual with an interest in the subject matter. That the organization has made the collection and dissemination of information on a particular subject its goal in life no more gives it an injury in fact each time it cannot obtain the information it wants than would be true of any one of its members. The organization's standing can, like water, rise no higher than its members' source. That the organization cannot carry on its ordinary affairs because it cannot get the information it desires from the government no more creates injury in fact than if it were seeking government funds to which it was not

otherwise entitled because it could not operate its ordinary affairs without that funding. That could hardly be said to provide it with an injury in fact for standing purposes unless the government were under some duty to provide the funding. I see no reason why the same is not true with respect to information.

Informational standing, of course, has a legitimate origin in those areas of the law where Congress has created a right to information and an obligation on the government to furnish it, and a plaintiff, attempting to exercise that right, has been denied the same. As the majority rightly notes, "Congress may not 'create' an Article III injury that the federal judiciary would not recognize, [but] . . . Congress can create a legal right . . . the interference with which will create an Article III injury." Maj. Op. at 736 (citations omitted). Thus, under statutes such as FOIA, where Congress has expressly entitled citizens to certain information, the withholding of that information by the government violates that statutory right and causes the injury in fact which underlies standing. This is so despite the fact that all citizens hold the right equally and that generalized grievances do not provide the injury in fact necessary for Article III standing. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 2564-65, 105 L.Ed.2d 377 (1989).

The logic of allowing that deprivation to constitute injury in fact despite the generalized nature of the right violated is, upon examination, inescapable. The right is generalized, but the injury is not. The injury has occurred specifically, individually, and palpably to the person who tried to exercise the right and was thwarted. If the generalized nature of a right were

sufficient to make the injury suffered in the deprivation of that right nonjusticiable, then there would be no way to vindicate, for example, First Amendment rights. Thus, standing under FOIA, under FACA, *see Public Citizen*, *supra*, and perhaps under the FECA is not "informational" standing at all. It is standing in its most traditional form. A plaintiff brings suit to vindicate an injury to a statutorily created right. That right happens to be access to information. But that type of action is not before us here. Plaintiffs in the instant case are not seeking to vindicate a statutorily created right.

The FEC is, as the majority makes clear, obligated under the Act to provide certain information to voters, indeed, to the population at large. If the plaintiffs had gone to the FEC seeking information that the Commission possessed and been denied it, and then jumped through the proper procedural hoops, the FEC could not credibly have argued that the plaintiffs did not have the injury in fact to make out standing. But that is not what happened. The plaintiffs did not seek access to information in the Commission's possession, but rather sought to have the Commission perform its alleged legal duty to regulate a third party—the American Israel Public Affairs Committee ("AIPAC")—in such a fashion as to cause the third party to give it the information to which the plaintiffs would then be entitled.

Although the Act contemplates citizen complaints initiating Commission investigation of violation of the Acts, 2 U.S.C. § 437g (1994), this is not to say that Congress has created a right to enforcement of the law, the violation of which constitutes an injury in fact for standing purposes. In *Heckler v. Chaney*,

470 U.S. 821, 831, 105 S. Ct. 1649, 1655, 84 L.Ed.2d 714 (1985), the Supreme Court reaffirmed "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." That being the case, the Court recognized "the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* For an injury to afford standing, it must be remediable in the action brought. As we cannot, under *Heckler*, afford a remedy for an injury consisting of no more than the generalized grievance that the Commission has failed to enforce the law, the Commission's failure to take the regulatory action of declaring AIPAC a political committee which would allegedly cause AIPAC to turn over the information to which appellants would then have access is not an injury which this court can remedy under *Heckler*.

Neither does the congressional provision affording a right to sue overcome the lack of standing. Granted, section 437g(a)(8)(A) permits any party aggrieved by the Commission's dismissal of a complaint or failure to act on such complaint to file a petition with the United States District Court for the District of Columbia. Such a statute creating a right to sue does not, however, create standing. At most, it invests a right to sue in those who otherwise have standing but would not necessarily have a clear claim to relief cognizable by a district court. The Supreme Court has clearly enunciated this concept in the analogous context of environmental litigation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the Court of Appeals had held, *inter alia*, that the citizens [*sic*] suit provision in 16

U.S.C. § 1540(g) provided standing. *Lujan*, 504 U.S. at 572, 112 S.Ct. at 2142-43 (citing 901 F.2d at 121-22). In reversing that holding, the Supreme Court expressly rejected the view that "the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573, 112 S.Ct. at 2143. The Court recognized without difficulty that such a view rejected the consistent holding of the Supreme Court "that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy." *Id.* at 573-74, 112 S.Ct. at 2143. The logic of *Lujan* is no less applicable here. These plaintiffs have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible. I would discard the entire notion of informational standing to the extent that it is something separate from traditional standing doctrine. Under traditional standing doctrine it is clear that these plaintiffs have stated no claim.

B. Redressability

Although I have alluded above to the absence of redressability as defeating standing, I wish to make it quite express that even if the grievance of voters is not held to be too generalized to afford standing, that grievance lacks the redressability essential to an Article III injury. Both we and the Supreme Court have repeatedly made it plain that where an injury to putative plaintiffs is "highly indirect" as to a governmental actor defendant, and " 'results from the

independent action of some third party not before the court,' " it is " 'substantially more difficult to meet the minimum requirement of Art. III' " standing than in the case of a direct injury. *Allen v. Wright*, 468 U.S. 737, 757-58, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. at 505, 95 S.Ct. at 2208).

The *Allen* Court pronounced that analysis in a discussion that began with the causation element of standing, finding the line of causation between a grant of tax exemption and the third party's offending conduct "attenuated at best." *Id.* at 757, 104 S.Ct. at 3327-28. The Court then reasoned from that attenuated causation to a conclusion that "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758, 104 S.Ct. at 3328. The *Simon* decision makes it even more clear that multi-level relief is not only problematic as to causation—that is to say that the independent act of a third party is rarely fairly traceable to the government's failure to regulate—but also as to redressability. In that case, the Court held that "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court." *Simon*, 426 U.S. at 41-42, 96 S.Ct. at 1926. In *Simon*, in *Allen v. Wright*, in *Fulani*, the high court and this one have repeatedly held that it is too speculative to meet the redressability requirement of Article III standing to

assume that an independent third-party actor would so amend its conduct to redress the wrong allegedly being done to the plaintiffs because of a court decree against the government. In those cases, admittedly, the regulatory act involved taxation. But the rationale is no different here.

In this case, no more than those, to find a lack of standing where redressability would depend on the Commission's regulation of a third party and that third party's response to the regulation is no "breathtaking attack on the legitimacy of virtually all judicial review of agency action," as the majority suggests. Maj. Op. at 738. Rather, it is only a specific application of general principles of standing jurisprudence.

Appellants' claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information plaintiffs seek, that AIPAC will comply with that order, and that appellants will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information after they jump through the procedural hoops. This, I submit, is too attenuated to provide the sort of redressability necessary to meet Article III standing.

CONCLUSION

Because the injury plaintiffs allege is neither personal to the plaintiffs nor redressable in this action, they lack standing to bring the claim to an Article III court. I would therefore affirm the grant of summary judgment entered by the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEE

[Argued May 10, 1995]
[Decided Sept. 29, 1995]
[As Amended Nov. 1, 1995]

OPINION

Before: EDWARDS, Chief Judge, SILBERMAN and SENTELLE, Circuit Judges.

Opinion concurring in part and dissenting in part filed by Circuit Judge SILBERMAN.

SENTELLE, Circuit Judge:

Appellants sought review in district court of the Federal Election Commission's dismissal of their administrative complaint alleging various violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (1994). The district court granted summary

judgment for the Federal Election Commission. Because we agree that the Commission acted in a reasonable manner in its interpretation and application of the Federal Election Campaign Act as to the administrative complaint, we affirm.

I. BACKGROUND

James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker (collectively, "appellants") are former ambassadors, congressmen or government officials. They are politically active people who seek to influence policymakers and the public and who oppose the views of the American Israel Public Affairs Committee ("AIPAC") regarding United States foreign policy in the Middle East.

AIPAC is an incorporated, tax-exempt organization with approximately 50,000 supporters nationwide that lobbies Congress and the Executive Branch for military and economic aid to Israel. AIPAC has an annual budget of close to $10 million. AIPAC's stated purpose is to encourage close relations between the United States and Israel.

On January 9, 1989, appellants filed a complaint with the Federal Election Commission ("FEC" or "Commission"), the independent government agency responsible for enforcement of the Federal Election Campaign Act ("FECA" or "Act"), claiming that AIPAC was a political committee under 2 U.S.C. §§ 431(4) and 431(9)(A)(i) because it made expenditures, including contributions, aggregating in excess of $1,000 in a year for the purpose of influencing any election for federal office. As a political committee, AIPAC would be subject to registration and reporting

requirements involving disclosure of its donors and the amounts it had contributed to candidates, as well as the $1,000 limit for contributions to individual candidates. 2 U.S.C. §§ 433, 434(a)(1) and (b), 441a(1) and (2) (1994).

The FEC investigated the allegations and after a substantial investigation, the General Counsel issued a report regarding AIPAC's corporate expenditures, campaign-related activities and political activities. While the FEC found that AIPAC has made contributions that likely crossed the $1,000 threshold, it concluded that AIPAC is not a political committee under the statute because its campaign-related activities constitute only a small portion of its overall activities and are not AIPAC's major purpose. The FEC stated that AIPAC is primarily a lobbying organization interested in promoting U.S.-Israel relations and its campaign-related activities are undertaken as an adjunct to its lobbying efforts.

Adopting the General Counsel's recommendations, the Commission found that there was no probable cause to believe that AIPAC was a political committee in violation of the disclosure and reporting requirements of sections 433 and 434 of the Act. The Commission did find probable cause to believe that AIPAC violated section 441b, which restricts expenditures and contributions by corporations, but unanimously voted to take no action.

Appellants filed suit in district court claiming that the FEC's final agency action—its determination of no probable cause to believe that AIPAC was a political committee under the Act—was arbitrary, capricious and contrary to law. Appellants allege that the FEC's major purpose standard is contrary to law and

that the Commission's findings, reasons, and investigation were insufficient to support its conclusion that there is no probable cause to believe that AIPAC's campaign-related activities were at such a level as to make them a major purpose of the organization. The district court granted summary judgment on the basis that the FEC's construction and application of the major purpose standard was proper under the Supreme Court's and this Circuit's interpretations of the Act. The court found no evidence that the Commission failed to investigate adequately appellants' administrative complaint.

II. DISCUSSION

A. Standing

Before addressing appellants' claim on the merits, we must first resolve a jurisdictional issue: whether appellants have standing, both constitutional and prudential, to pursue their claims in federal court at all. In order to establish constitutional standing, appellants "must show injury in fact that is fairly traceable to the defendant's action and redressable by the relief requested." *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994) ("*ALDF*") (citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982)).

Section 437g(a)(1) of FECA allows any person who believes that there has been a violation of the Act to file a complaint with the FEC. In turn, section 437g(a)(8)(A) states that any party *aggrieved* by an order of the FEC dismissing its complaint may file a

petition with the U.S. District Court for the District of Columbia.

Appellants allege that the FEC's action has denied them their right as citizens, registered voters, and members of the public to obtain information that AIPAC as a political committee would be required to disclose. They contend that their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures.[1] While arguably an injury of this type would not appear to meet the requirements of Article III standing, a line of circuit precedent, beginning with a footnote in *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973), has recognized certain "informational injuries" resulting from agency action. *Id.* at 1087 n. 29 (finding appellants have standing to challenge AEC decision not to issue environmental impact statement because agency action limited appellants' ability to inform public about social issues and questions of public policy); *see also Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (finding organization adequately alleged informational injury in regulations restricting flow of information regarding services available to the elderly); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991) (assuming that Agriculture Department's failure to prepare impact statement with respect to germplasm program injured Foundation because its mission is to

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[1] Appellants have also alleged that their ability to compete in the political arena with AIPAC is weakened without the information. We do not recognize standing on that basis in this case.

provide information to its members and general public about such matters, but holding that appellants lacked standing on grounds that they failed to show particular agency action that triggered violation and caused injury). This court recently found informational injuries that satisfied the minimum requirements of Article III standing in *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994) (finding constitutional standing, but dismissing case for lack of prudential standing); *ALDF*, 23 F.3d 496 (same). Although we acknowledge that this broad approach raises "complex and difficult considerations," *Lyng*, 943 F.2d at 84 (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1042 n. 6 (D.C. Cir. 1979)), circuit precedent compels that we find that appellants in this case meet the requirements of Article III standing with the informational injury they have alleged.

Appellants must also satisfy the prudential prerequisites of standing; they must show that they fall within the statute's "zone of interests" by demonstrating "either a congressional intent to protect or regulate the interest asserted, or some other indication that the litigant is a suitable party to pursue that interest in court." *ALDF*, 23 F.3d at 502 (citations omitted).

Given the broad purposes of FECA, appellants appear to meet this test. Two of the three purposes of the Act's disclosure requirements were intended to serve the information interests of the public, the electorate, and individual voters. These purposes were noted in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976):

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Id. at 66-67, 96 S.Ct. at 657 (footnotes omitted). Because appellants allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the "zone of interests" intended to be served by the statute. While arguably this interest is so generalized as to encroach upon the separation of powers concerns underlying Article III standing requirements, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78, 112 S.Ct. 2130, 2142-46, 119 L.Ed.2d 351 (1992), to reject standing on that basis would put us at odds with circuit precedent on informational injury as discussed above.

B. Standard of Review

The district court's grant of summary judgment is subject to *de novo* review. *Petersen v. Dole*, 956 F.2d 1219, 1221 (D.C. Cir. 1992). In conducting that review, we must determine anew whether the Commission's dismissal of the portion of appellants' administrative complaint alleging that AIPAC violated the Act by

failing to register and report as a political committee is "contrary to law." 2 U.S.C. § 437g(a)(8)(C). It is well settled that judicial review under this provision is limited. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). The Commission's dismissal of an administrative complaint cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). *See also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44-45, 70 L.Ed.2d 23 (1981) ("*DSCC*").

Appellants bear the difficult burden of demonstrating that the Commission's interpretation was impermissible and contrary to law. The Commission must show only that its disposition of the administrative complaint was "sufficiently reasonable." *DSCC*, 454 U.S. at 39, 102 S.Ct. at 46 (citations omitted). Thus, the Commission's construction of its own statute cannot be disturbed if it is a permissible one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Under this standard of review, the court will presume that the Commission's action was valid, even if the court would have interpreted the Act in a different manner. *See American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). Indeed, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37, 102 S.Ct. at 45. *Accord Common Cause*, 842 F.2d at 448 ("Deference is particularly appropriate in the context of the FECA. . . .").

C. Analysis

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).[2] The Act limits contributions to political committees, 2 U.S.C. § 441a(a)(1)(C), and requires any organization that qualifies as a political committee to register with the Commission and file periodic reports of all its receipts and disbursements for disclosure to the public. 2 U.S.C. §§ 433 and 434.

The Act defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. . . ." 2 U.S.C. § 431(8)(A)(i). The definition of "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of

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[2] Section 431(4) also includes two other definitions of the term "political committee" not pertinent to this case:

> (B) any separate segregated fund established under the provisions of section 441b(b) of the title; or
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> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contribution aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

value made by any person for the purpose of influencing any election for Federal office. . . ." 2 U.S.C. § 431(9)(A)(i). An expenditure "for a communication expressly advocating the election or defeat of a clearly identified candidate" is a "contribution in kind" unless it is "not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate. . . ." 11 C.F.R. § 109.1(a), (c) (1995).

The debate in this case centers around the definition of "political committee" and the FEC's application of the major purpose standard. Appellants argue that the Act's language governing whether an organization making contributions is a political committee depends on a single quantitative standard: if its aggregate contributions are in excess of $1,000 in a calendar year. 2 U.S.C. § 431(4). They assert that because the statutory language is clear, the Commission's interpretation is not entitled to deference under *Chevron*. Appellants also argue that the major purpose test conflicts with the fundamental purposes of the Act, which are to prevent corruption and the appearance of corruption that arise when large contributions are given to secure a political *quid pro quo* from current and potential officeholders. *Buckley*, 424 U.S. at 26, 96 S.Ct. at 638.

We recognize that the Act has a broad definition of political committee; Congress intended to "address[ ] broadly the problem of political campaign financing," and wanted to "promote full disclosure of campaign-oriented spending" with FECA. *Id.* at 78, 96 S.Ct. at 663. The Commission, however, has construed the words "political committee" narrowly and applied a major purpose standard in determining whether

AIPAC was a political committee. Under this narrow interpretation, gleaned from case law, an organization is not a political committee unless, in addition to crossing the $1,000 threshold, it is under the control of a candidate or its major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n. 6, 107 S.Ct. 616, 624-25 n. 6, 93 L.Ed.2d 539 (1986). *Accord FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981). A more expansive definition would be constitutionally dangerous due to interference with "fundamental First Amendment interests." *Buckley*, 424 U.S. at 23, 96 S.Ct. at 636; *Machinists*, 655 F.2d at 392.

We agree with appellants that the statutory language is clear in that it broadly defines political committee in economic terms. But our inquiry does not end there. Rather, we must determine whether the Commission acted contrary to law by going beyond the text of the statute to narrow the definition of the term "political committee." To answer this question, we must look to case law interpreting the Act.

In *Buckley*, one of the plaintiffs' claims was that the reporting and disclosure provisions applicable to political committees were overbroad in their application to minor-party and independent candidates and in their extension to small contributions. 424 U.S. at 26, 96 S.Ct. at 638. The Court cautioned that the phrase "for the purpose of . . . influencing" an election or nomination in section 431's definition of "expenditure" could raise vagueness problems and "could be

interpreted to reach groups engaged purely in issue discussion." *Id.* at 79, 96 S.Ct. at 663. Noting that the lower courts had construed the term "political committee" more narrowly, the Court went on to state that to fulfill the purposes of the Act the term "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* It further noted that expenditures by political committees can be assumed to fall within the core area Congress sought to address because "[t]hey are, by definition, campaign related." *Id.*

Prior to *Buckley*, at least two lower courts were concerned with the Act's broad-based definition of political committee because it would likely include groups that were not meant to be subject to the restrictions of the Act. *See United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972) ("*NCFI*"); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973), *vacated on other grounds*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975).

In *NCFI* the Second Circuit considered whether a newspaper advertisement was an "expenditure," and whether the National Committee must be deemed a political committee. 469 F.2d at 1138. The court articulated a test that construed "the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *Id.* at 1141. It concluded that the advertisement was not an "expenditure," but noted that its interpretation of the phrase "for the purpose of influencing . . . [an] election" might make "enforcement of the Act . . .

somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." *Id.* at 1142. This test was later adopted by the United States District Court for the District of Columbia in *ACLU v. Jennings*, *supra*.

Appellants argue that the major purpose test set forth in *NCFI* and *Jennings* is the correct one because it centers on the major purpose of the *expenditure* as opposed to the purpose of the organization itself. We reject this argument for three reasons. First, it is inconsistent with the language in *NCFI* noting that "supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." 469 F.2d at 1142. Second, the statutory definition of "expenditure" includes the requirement that it be made "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9)(A)(i), making the test that every expenditure have the major purpose of nomination or election of a candidate and rendering appellants' test a tautology. Third, Supreme Court precedent supports a conclusion that the focus is on the major purpose of the *organization*, rather than the major purpose of individual expenditures by an organization.

For example, in *Massachusetts Citizens*, the Supreme Court again mentioned the major purpose test while discussing whether a small-issue advocacy group could be considered a political committee. 479 U.S. at 262, 107 S.Ct. at 630. The Court found that although the group had made $10,000 in independent expenditures to influence federal elections, it had not violated the restriction on independent spending by

corporations contained in section 441b. The Court based its holding on three features of the citizens group, one of which was that its purpose was promoting political activities, not amassing capital.[3] *Id.* at 263-64, 107 S.Ct. at 630-31. The Court further noted that if the group's independent spending became "so extensive that the organization's major purpose may be regarded as campaign activity," then it would be classified as a political committee. *Id.* at 262, 107 S.Ct. at 630 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663).

This Circuit also adopted a narrow construction to determine whether a "draft group," that is, an organization that seeks to encourage a specific candidate to run for office, is a political committee under FECA. *See Machinists*, 655 F.2d at 394-96. In *Machinists*, we expressed concern about finding a fair reading of the statute that "comports with first amendment safeguards," and recognized the "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393. We declined to extend the term "political committee" to cover draft groups and noted that in doing so we would "avoid the constitutional problems which *Buckley* and its lower court predecessors were able to avoid by

[3] The Court also based its holding on the fact that the citizens group had no shareholders or other persons having a claim on its assets or earnings and that the group was not formed by a labor union or business corporation, and its policy was not to accept contributions from these entities. *Massachusetts Citizens*, 479 U.S. at 264, 107 S.Ct. at 631.

narrowly construing the term. . . ." *Id.* at 394. Because we found the Machinists Non-Partisan Political League's activities did not support an existing candidate, it was not a political committee under the Act. *Id.* at 396.

Appellants ask that we disregard both *Buckley* and *Massachusetts Citizens* as mere dicta. However, the scope of our inquiry is limited to the issue of whether the Commission's interpretation of the Act was contrary to law. Thus, even if the Court's discussion of the major purpose test in these decisions was dicta—and we do not necessarily agree—that would not make it an abuse of discretion for the Commission to follow this construction of the Act by the Supreme Court, particularly in light of our decision in *Machinists*. The Supreme Court's dicta may not bind federal courts and agencies, but an agency's reliance on dicta may nonetheless be reasonable. *See generally McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992).

Although *Buckley* and *Massachusetts Citizens* concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958). It is our duty in the interpretation of a federal

statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770 (1953).

We find that it was reasonable for the Commission to follow the Court's and this Circuit's narrow interpretation of "political committee." Because a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law.

Having established the validity of the Commission's major purpose test, we must next determine whether its application of that test and its determination that AIPAC is not a political committee under the Act was contrary to law. 2 U.S.C. § 437g(a)(8)(C). The Commission determined that AIPAC's campaign-related expenditures, while likely to have exceeded $1,000 in some years, were not its major purpose but were made as an adjunct to, and in support of, the lobbying efforts that were the organization's primary focus. The Commission correctly applied the major purpose test, the concern of which is the core purpose of the organization itself, not the individual expenditure or contribution. We are convinced that the Commission's determination was not so arbitrary or capricious to render it contrary to law.

Appellants' final and related argument is that the Commission's findings, reasons, and investigation were inadequate to support its conclusion that "only a small portion" of AIPAC's activities are campaign related. They assert that the inadequacy of the FEC's findings, reasons, and investigation preclude affirmance of the Commission's decision. In challenging the extent and techniques of the Commission's investigation, appellants are asking that we review the Commission's exercise of prosecutorial discretion, a sensitive matter within the Commission's expertise. *See Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985). We are mindful that "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

Under FECA, the Commission enjoys a "broad grant of discretionary power in determining whether to investigate a claim or to bring a civil action. . . ." *Common Cause v. FEC*, 655 F.Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988). A review of the General Counsel's report reveals that the Commission conducted a fairly extensive inquiry into appellants' claims, even if it was not as in-depth an investigation as appellants would have liked. The Act does not require the Commission to invoke any particular investigatory techniques, nor does it require the Commission to exhaust every last inquiry. Moreover, appellants suggest no specific areas that the FEC failed to investigate that would have undermined its determination. The Commission has broad discretion to decide whether further investment of resources is worthwhile, *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655-56, and we defer to its expertise regarding the direction and extent of the investigation. Based on all of the evidence, it was reasonable for the Commission to

conclude that campaign-related activities were not a major purpose of AIPAC. There is no evidence that the Commission failed to investigate adequately the administrative complaint.

III. CONCLUSION

The Commission's interpretation of the statute was permissible, its application of the interpretation was reasonable, and its underlying investigation was adequate. Thus, we are unable to find that the Commission's actions were "contrary to law" or arbitrary, capricious, or an abuse of discretion. The decision of the district court is therefore

Affirmed.

SILBERMAN, Circuit Judge, concurring in part and dissenting in part:

Although the FEC did not challenge appellants' standing, we were sufficiently troubled over our jurisdiction to ask the parties to submit supplemental briefs on the issue. I have come to the conclusion that my colleagues are correct that appellants have standing, but my analysis differs from the majority. I disagree with my colleagues on the merits.

I.

The dispute over standing turns entirely on whether appellants have established injury in fact. Appellants assert that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes. Although appellants do not allege that they make political contributions, it is asserted that AIPAC's secret contributions to congressmen have disadvantaged appellants in this politi-

cal competition. Of course, many cases in both our court and the Supreme Court have recognized Article III injury when economic marketplace actors assert that a competitor has received a regulatory advantage. *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S.Ct. 158, 159, 27 L.Ed.2d 179 (1970) (per curiam); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 805-12 (D.C. Cir. 1983), *cert. denied sub nom. Breen v. International Ladies' Garment Workers' Union*, 469 U.S. 820, 105 S.Ct. 93, 83 L.Ed.2d 39 (1984). We have not before now encountered a case in which the competition takes place in the political arena. I am mindful that a plaintiff may not rely for a claimed injury on a mere ideological interest, *see Competitive Enter. Inst. v. National Highway Traffic & Safety Admin.*, 901 F.2d 107, 112 (D.C. Cir. 1990), but I think appellants' case must be thought of as akin to one brought by an economic competitor, not to one brought by a litigant who can muster only an ideological interest.

The statute, by requiring any organization that makes or receives campaign contributions or expenditures aggregating over $1,000 per year to register as a political committee and meet certain reporting and disclosure requirements, has the clear purpose of leveling the playing field by reducing the value of campaign contributions and expenditures to both spender and recipient. Any campaign contribution or expenditure is worth less to give and receive if it must be disclosed. It is of less value to the spender because interests adverse to the spender will take notice, and the recipient may be politically pressured

to avoid any appearance of *quid pro quo* in policy positions. It is, at the same time, worth less to the recipient because undesirable publicity can be brought to bear on the transaction. And, in any event, the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents. Essentially, then, a failure of the FEC to require an organization to disclose its contributions is equivalent to *adding* to the value of those contributions. Thus, a candidate running for office is certainly injured if his or her opponent, through the failure of the FEC to require disclosure, is enabled to receive secret contributions. It follows that individuals or organizations that can show that they are competing with the donor or spender on the other side of this political market are similarly injured if the FEC does not require disclosure. Appellants therefore have standing as competitors of AIPAC.

The FEC's primary argument against the application of this reasoning, which, to be sure, is only sketchily presented in appellants' complaint and supplementary brief, is that appellants only compete in the lobbying market with AIPAC, not in actual election campaigns. (AIPAC claims that it does not normally make campaign contributions, and it presumably will no longer do so given the FEC's finding of probable cause to believe that AIPAC violated § 441(b)). But, the lobbying "market" is intertwined with election competition. Many campaign contributors expect that if the candidate should win, he or she will be more inclined to listen to a contributor's views on proposed legislation than would be so if no contribution were made. In this very

case, the Commission found that AIPAC's "campaign-related activities and communications [were] undertaken as an adjunct to, and in support of, its lobbying efforts." AIPAC presumably will be a less effective lobbyist, and the congressmen to whom it contributed will be less likely to present AIPAC's position effectively (if they are so inclined), if AIPAC is required to disclose its contributions.

The Commission relies on *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. U.S. Catholic Conference*, 495 U.S. 918, 110 S.Ct. 1946, 109 L.Ed.2d 309 (1990), to support its argument that only direct competitors in the campaign election market would have standing to challenge its refusal to require AIPAC to register and disclose. In that case—a rather confusing one—the Second Circuit rejected a challenge brought by pro-choice advocacy groups to the Catholic Church's § 501(c)(3) status under the I.R.S. Code based on the church's illegal campaign expenditures. The court did note that the plaintiffs did not engage in election activity, but it seems clear to me that the case would not have come out differently even if the plaintiffs had been direct electioneering competitors of the church. The federal judiciary has rarely allowed one private party to challenge the tax status of another. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-41, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976). Furthermore, the general advocacy market in which both the church and the plaintiffs were competing is

so broad and amorphous as to defy measurement of plaintiffs' injury.[1]

The majority rests appellants' standing on what is sometimes referred to as informational standing—that appellants are injured by failing to receive information that the government should compel AIPAC to disclose. That approach is problematic here because recognition of informational standing in this case allows a generalized, undifferentiated interest in information to satisfy Article III requirements. "Informational injury" confers standing only in narrowly defined circumstances. It was first mentioned in a footnote in *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973) (*SIPI*).[2] We recognized that the AEC's decision not to provide an impact statement on a reactor program established Article III injury because the Institute's main function was to distribute such information to the public. Similarly, we determined informational injury satisfied Article III

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[1] Of course, as the Commission indicates, the appellants are in one sense seeking a more severe sanction for AIPAC's illegal expenditures than the FEC determined was appropriate, but that does not undermine their standing. Under most statutes, this sort of action could not be brought because of *Heckler v. Chaney's* bar on judicial review of an agency's non-enforcement decision. 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-56 (1985). But this statute squarely directs review of the Commission's determination. *See* § 437(g)(8)(c) ("In any proceeding under this paragraph the court may declare that the [FEC's] dismissal of the complaint or the failure to act is contrary to law.").

[2] The footnote was subsequently declared "unnecessary to the decision." *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991).

in *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001, 110 S.Ct. 1329, 108 L.Ed.2d 469 (1990), where new government regulations restricting the availability of information on services for the elderly impaired AASC's ability to provide information, counseling and referral services for its members. By contrast, in *Competitive Enter. Inst.*, 901 F.2d at 122-23, the plaintiff organization lacked informational standing because it failed to show how the NHTSA's decision not to issue an EIS significantly diminished its ability to disseminate information or to continue its activities.

Two cases relied on by the majority to find informational standing are not determinative. In *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991), we only assumed that the organization's alleged injury—the Foundation's diminished ability to provide information to its members and the public due to the Agriculture Department's failure to prepare an EIS—was sufficient to confer informational standing without resolving the issue, because there was no prudential standing. We suggested, however, that informational injury alone is insufficient to establish Article III standing. We worried that a broad definition of informational standing would controvert the separation of powers principles enunciated in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), and would allow plaintiffs to manufacture standing every time an agency was not creating information a member of the public would like to have. *Lyng*, 943 F.2d at 84-85. And in *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 501 (D.C. Cir. 1994), the

decision merely asserted without discussion that Article III requirements were met by informational injury—the Fund's impaired ability to gather and disseminate information on laboratory conditions under the Agriculture Department's definition of "animal"—before going on to find no prudential standing.

Thus, under our precedent, "informational injury" satisfies Article III requirements only when the plaintiff is able to demonstrate an actual, concrete injury, that impinges on the plaintiff's daily operations or makes normal activities infeasible, and that is caused by the lack of access to particular information. To call appellants' injury an informational one is to accept their alternative claim that they are entitled to AIPAC's disclosures merely because they are members of the voting public. This sort of general interest cannot suffice to show Article III injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 112 S.Ct. 2130, 2142, 119 L.Ed.2d 351 (1992); *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1369; *Allen v. Wright*, 468 U.S. 737, 760-61, 763, 104 S.Ct. 3315, 3329, 3331, 82 L.Ed.2d 556 (1984). If, instead, appellants' interest is thought more "particular" because of their political positions and their lobbying interests, then the claim of informational injury really reduces to the competitive injury claim. Thus, as I analyze appellants' injury, it is the Commission's failure to require AIPAC to disclose to the world its past campaign expenditures that disadvantages appellants—not appellants' inability to themselves gain that information.[3]

[3] Plaintiffs in this case clearly meet prudential standing requirements in that they are within the statutory "zone of interest." *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 394-99, 107 S.Ct. at 754-57; *Animal Legal Defense Fund*, 23 F.3d at 503. As the majority notes, FECA's purposes are broadly stated. But FECA's "zone of interest" cannot, as the FEC asserts, include only individuals' interests as *voters* and not individuals' interests as both *competitors* and *voters*. The logical implication of the FEC's argument is that prudential standing exists (as a "pure" voter) only where Article III standing is precluded (as a general interest under *Lujan*), so that no one would have standing. This result is absurd. Clearly a direct competitor of a political candidate, as the party most directly injured by improper campaign activities, is within the zone of interests intended to be protected by the statute. Thus, the statutory zone of interest is not limited to voters, but includes other political interests as well.

Moreover, FECA's broad language may in fact make a prudential standing inquiry irrelevant. If all voters are beneficiaries of the statute and are thus "aggrieved" within the meaning of § 437(g)(8), Article III always would impose a more restrictive standard, such that meeting Article III requirements alone would establish standing.

II.

Section 431(4)(A) defines "political committee" solely in terms of "expenditures" and "contributions": a political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." "Contribution" is defined in turn by § 431(8)(A)(i) as "any gift, subscription, loan, advance, or deposit of money or anything of value, made by any person for the purpose of influencing any election." "Expenditure" is defined in similar terms by § 431(9)(A)(i) as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of

value, made by any person for the purpose of influencing any election."

The FEC tacitly concedes that the language of § 431(4)(A) is unambiguous and sets clear requirements for classification as a political committee, but asserts that the Supreme Court has narrowed the reach of the statutory language in response to First Amendment concerns. The FEC relies on language in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), in claiming that an organization should only be classified as a political committee if—in addition to exceeding the $1,000 contribution or expenditure limits—the *organization's* major purpose is the nomination or election of a candidate or the organization is controlled by a political candidate, *i.e.*, the so-called major purpose test.[4] This interpretation of "political committee" is owed deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Appellants respond by asserting that the statutory language is clear, and that it has not been narrowed by the Supreme Court. Tracing the development of the term "major purpose," appellants argue that the test is properly employed to determine whether an

[4] This is apparently the first time the FEC has formulated this test; it has pointed to no Advisory Opinion that articulates either explicitly or implicitly a major purpose test, even 10 years after the Supreme Court cases on which it primarily relies—*Buckley*, 424 U.S. 1, 96 S.Ct. 612, and *MCFL*, 479 U.S. 238, 107 S.Ct. 616—supposedly imposed this test on the definition of political committee.

organization's independent disbursements constitute "expenditures" within the meaning of § 431(9)(A)(i), *i.e.*, whether they are "made . . . for the purpose of influencing any election," such that they count toward the $1,000 limit defining political committee status. *Buckley* and *MCFL* endorse this test; any references to the major purpose of an organization, rather than an expenditure, merely establish the presumption that the expenditures of an organization the major purpose of which is election activity will fall within the statutory definition. Further, *MCFL* noted that independent expenditures raise more serious First Amendment concerns and therefore require more compelling justification for government restrictions, than do contributions like those made by AIPAC here. Appellants point out that the FEC's major purpose test has the anomalous result of allowing large organizations that spend only a small portion of their budgets on direct campaign contributions to avoid the requirements placed on political committees, undermining FECA's emphasis on disclosure as a means of curbing the threat or appearance of election abuse.

The FEC's assertion that its interpretation of "political committee" is entitled to deference is simply wrong. It is undisputed that the statutory *language* is not in issue, but only the gloss put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other case. Appellants thus do not bear "the difficult burden of demonstrating that the Commission's interpretation was impermissible and contrary to law," Maj.Op. at 352; they need only show that their inter-

pretation better reflects the statutory language and purpose, as interpreted by the Supreme Court, than does the FEC's.

While there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position, both cases focused on the constitutional concerns raised by *independent expenditures*. Independent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the goal of preventing election corruption. *Buckley*, 424 U.S. at 19-23, 78-81, 96 S.Ct. at 635-37, 663-64; *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29. They raise graver First Amendment concerns because it is difficult to determine when an expenditure is independent—rather than coordinated with or by a particular candidate—and regulation therefore risks chilling protected speech.

Thus, in *Buckley* the Supreme Court determined that expenditure limits are more likely to violate the First Amendment because they place substantial and direct restrictions on the ability to engage in political speech. *See Buckley*, 424 U.S. at 39-59, 96 S.Ct. at 654. Contribution limitations, on the other hand, raise fewer constitutional concerns, it was thought, because they serve the basic governmental interest of protecting the electoral process *without* restricting political debate and discussion. *See id.* at 28, 96 S.Ct. at 639 (such limits "focus[ ] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *see also id.* at 23-38, 96 S.Ct. at 636-44. To support its major purpose test, the FEC relies on the Court's

discussion of § 434(e), which imposes disclosure requirements on "[e]very person" making contributions or expenditures exceeding $100.[5] The Court rejected the claim that § 434(e) imposed burdens that would deter individuals "from making expenditures for their independent political speech." *See id.* at 74-75, 96 S.Ct. at 661. It was determined that "contributions"—when defined as direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the cooperation or consent of a candidate—"have a sufficiently close relationship to the goals of the Act," and therefore limits on them are constitutional. *Id.* at 76, 96 S.Ct. at 662. The Court noted that the meaning of "expenditure," however, posed line-drawing difficulties because it created the danger of "encompassing both issue discussion and advocacy of a political result." *Id.* at 77, 96 S.Ct. at 662. Therefore, the reach of § 434(e) was limited by "construe[ing] 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. at 664. Coming in the midst of its analysis of the scope of "expenditures," the Court's language that apparently refers to the major purpose of an organization is at best ambiguous:

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[5] Section 434(e) has subsequently been amended and is now § 434(c): "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year" shall be subject to certain reporting and disclosure requirements. 2 U.S.C. § 434(c) (West 1985 & Supp.1995).

> To fulfill the purposes of FECA [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. *Expenditures* of candidates and of "political committees" *so construed* can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79, 96 S.Ct. at 663 (emphasis added).[6] When parsed carefully, this wording does not support the FEC's major purpose test for "political committee" status as applied to contributions. Perhaps the best interpretation of this language is that an *organization* controlled by a candidate or the major purpose of which is election-related will presumptively have *expenditures* falling within the statutory definition. In any event, the Court clearly distinguished *expenditures* and *contributions* and referred to a "major purpose" test only with regard to the former.

While certain language in *MCFL* can also be read to support the FEC's position, the Court was again addressing First Amendment problems with the regulation of *independent expenditures*. The Court held

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[6] *Buckley* cited both *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) and *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union, Inc.*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975), as developing this "major purpose" test. These two cases applied a "major purpose" test to determine whether a particular disbursement was "made . . . for the purpose of influencing any election" under § 431(9)(A)(i).

that § 441(b), which prohibits corporate contributions or expenditures "in connection with any election," was unconstitutional as applied to MCFL, a non-profit advocacy group that had made independent expenditures violating § 441(b). The Court's concern was that the reporting and disclosure requirements of FECA might discourage protected political speech of advocacy groups. *See id.*, 479 U.S. at 253-56, 107 S.Ct. at 625-27. While *MCFL*'s references to the major purpose of an organization may thus have relevance for the issue of when *independent expenditures* suffice to establish political committee status, *MCFL* does not control cases involving contributions or coordinated spending. The Court's analysis clearly distinguishes contributions and expenditures: "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630 (quoting *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663) (emphasis added).[7] As in *Buckley*, this language can plausibly be read as merely creating a presumption that certain organization's expenditures are "made . . . for the purpose of influencing any election." Also as in *Buckley*, the underlying concern is that congressional regulation, in its effort to achieve full disclosure, may impermissibly discourage protected independent expenditures.

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[7] Of the Court's two references to a major purpose test, the first was joined by only a plurality of Justices. The second, quoted here, was joined by Justice O'Connor, whose concurrence emphasized that *Buckley* still applied and that disclosure requirements for independent expenditures were generally valid. *Id.*, 479 U.S. at 265-66, 107 S.Ct. at 631-32.

In short, the Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no longer a constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign *contributions* exceeding the statutory limits.

The FEC's conception of the major purpose test does not make this distinction between expenditures and contributions, and it therefore imposes an unduly narrow definition of "political committee."[8] It allows a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. This ignores the $1,000 limit in § 431(4)(A)'s definition of

[8] Contrary to the FEC's assertion, we did not endorse its "major purpose" test in *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981). In *Machinists*, we held that "draft groups" that promoted the acceptance of particular individuals prior to their actual nomination did not fall within § 441(a)'s definition of political committee because the expenditures and contributions were not made to a "candidate." *Id.* at 296. While our language suggested that it is not the "purpose" of the organization itself but of its disbursement (its "activities") that is relevant to determining whether a group is a political committee, our decision was based on Congress' expressed intent to exclude draft groups from the definition of political committee. *See id.* at 394-96.

"political committee," even in the absence of significant First Amendment concerns with regulating contributions. Moreover, that such an organization may be limited by other provisions of FECA as well is irrelevant. There is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive. Various provisions impose different, if overlapping, limits and requirements on organizations; these differences represent the sound exercise of congressional judgment as to the various degrees of risk to the election process posed by certain activities. While the FEC's "major purpose" test may therefore be valid in determining whether an organization making independent expenditures is subject to the requirements imposed on "political committees," it cannot legitimately be used to place contributions exceeding $1,000 outside the scope of § 431(4)(A)'s definition of "political committee."

There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made direct campaign contributions in excess of $1,000. The FEC's decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further consideration—and if necessary further

investigation[9]—of AIPAC's status. I respectfully dissent.

[9] Appellants alternatively claimed that the FEC's investigation was inadequate. The FEC's decisions on how and to what extent to investigate, while reviewable, command substantial deference. *Cf. Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (judicial review particularly circumscribed in area of prosecutorial discretion); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1091 (D.C.Cir.1986) (courts have limited role in supervising agency use of limited resources). And the statute imposes no particular investigatory techniques or obligations. Here, even though appellants note several leads that the FEC could have pursued more vigorously, the investigation probably passes the minimal level of sufficiency. To require a full-blown court examination of each investigatory decision would intrude too deeply into the FEC's proper area of authority. Moreover, under the circumstances of this case, the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

[Jan. 25, 1996]

ORDER

Prior report: 66 F.3d 348

Before: EDWARDS, Chief Judge; WALD, SILBERMAN BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, Circuit Judges.

PER CURIAM.

Upon consideration of appellants' suggestion for rehearing *in banc* and of the response thereto, it is

ORDERED, by the Court *in banc*, that the suggestion is granted. This case will be considered and decided by the court sitting *in banc* on both the standing and statutory construction issues. It is

FURTHER ORDERED, by the Court *in banc*, that the judgment filed herein on September 29, 1995 is hereby vacated.

A future order will govern further proceedings.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (JLG)

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

Filed: [Mar. 30, 1994]

OPINION

This matter is before the Court on cross-motions for summary judgment, pursuant to Federal Rule of Civil Procedure 56(a). The Court has considered the filings, the arguments presented by counsel at the hearing on the motion, the record and the relevant case law. For the reasons set forth below the Court grants defendant's Motion for Summary Judgment and denies plaintiffs' Motion for Summary Judgment.

I. Background

a. Parties

The plaintiffs in this case are six individuals who were former ambassadors, congressmen or government officials. They are politically active people who oppose the views of the American Israel Public Affairs Committee ("AIPAC"), regarding U.S. for-

eign policy in the Middle East. The plaintiffs compete with AIPAC in an effort to influence the opinions and actions of members of Congress, the executive branch and the public.

The defendant, Federal Election Commission ("FEC" or "Commission"), is the independent government agency responsible for enforcement of the Federal Election Campaign Act, ("FECA" or "Act"), 2 U.S.C. §§ 431-455 (1981).

The American Israel Public Affairs Committee ("AIPAC") is not a party in the case, although the Court granted it leave to file as *amicus curiae*.[1] AIPAC is an incorporated, tax-exempt lobbying organization with approximately 50,000 supporters. AIPAC's function is to encourage close United States-Israel relations and to provide services to its supporters. Administrative Record at 1469 (hereinafter "A.R. at ."). "AIPAC's stated purpose has been to 'conduct public action with a view to maintaining and improving the friendship and goodwill between the United States and Israel.'" *Id.*

b. The Administrative Complaint

On January 9, 1989, plaintiffs filed an administrative complaint with the FEC, designated as Matter Under Review ("MUR") No. 2804, against AIPAC and twenty-seven political action committees. *See*, 2 U.S.C. § 437g(a)(1). The complaint advanced four arguments:

1) AIPAC is a political committee as defined by the Federal Election Campaign Act, because it is a

[1] AIPAC filed a brief that addressed issues unrelated to plaintiffs' complaint; therefore, the Court struck the pleading by Memorandum and Order dated December 8, 1993.

"club, association, or other group of persons which makes expenditures aggregating in excess of $1000 during the calendar year..." 2 U.S.C. §431(4)A. As a political committee, AIPAC is required to register with the Commission. 2 U.S.C. § 433. And, AIPAC must adhere to the reporting requirements established by the FECA. 2 U.S.C. § 434.

2) AIPAC and the twenty-seven political committees are affiliated and therefore, are required to file a statement of affiliation with the FEC. 2 U.S.C. § 441a(a)(5). Under the Act, all contributions made by affiliated committees are treated as though they were made by a single committee, therefore affiliated committees are subject to expenditure limitations of 2 U.S.C. § 441a(a) (2) (A).

3) AIPAC improperly failed to disclose its election-related activity to the FEC.

4) AIPAC made illegal campaign expenditures.

Based upon two reports generated by the General Counsel, the FEC issued two certificates of agency action which closed the case.

On November 29, 1989, the General Counsel recommended that the FEC find "no reason to believe" that AIPAC and the twenty-seven political committees were in violation of 2 U.S.C. § 441a(a)(5) by reason of affiliation. *See*, A.R. at 2515-2516, General Counsel's Report, November 29, 1989. Because the Commission determined that AIPAC and the twenty-seven political committees were not affiliated, they were not in violation of spending limitations imposed by 2 U.S.C.

§ 441a(a)(2)(A). *See*, A.R. at 2675-2678, FEC's Certification, December 20, 1989.

After an extensive investigation, the General Counsel issued a report regarding AIPAC's corporate expenditures, campaign-related activities and political activities. *See*, A.R. at 3671-3778, General Counsel's Report, January 30, 1992. The General Counsel recommended that the Commission find no probable cause to believe AIPAC violated 2 U.S.C. § 433 and 434; and find probable cause to believe AIPAC violated 2 U.S.C. § 441b.

By a certification signed on June 16, 1992, and issued on June 17, 1992, the Commission adopted the General Counsel's recommendations. A.R. at 3871-3872, FEC Certification, June 16, 1992. First, the FEC found no probable cause to believe that AIPAC was a political committee in violation of 2 U.S.C. §§ 433 and 434. Second, the Commission found probable cause to believe that AIPAC violated 2 U.S.C. § 441b "by making contributions to or expenditures on behalf of federal candidates in the form of communications to a group of persons that AIPAC considered members." A.R. at 3924, "Statement of Reasons," July 27, 1992. Although the FEC found AIPAC to be in violation of 2 U.S.C. § 441b, the Commission exercised its prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and took no action with respect to the violation. By unanimous vote, the Commission closed the file on June 16, 1992. A.R. at 3872.

c. District Court Complaint

Pursuant to 2 U.S.C. § 437g(8) (A), plaintiffs filed a Complaint before this Court on August 12, 1992. In the Original Complaint, plaintiffs sought judicial review of the FEC's final adjudication which dismissed their administrative complaint. Plaintiffs urged the Court to impose declaratory and injunctive relief against the FEC for failure to enforce the Federal Election Campaign Act in the disposition of their administrative complaint against AIPAC and the twenty-seven political committees. Plaintiffs filed a Motion for Leave to File First Amended Complaint on December 21, 1992. The Court granted plaintiffs' Motion for Leave to File First Amended Complaint and the case was narrowed to one cause of action. *See*, Memorandum & Order filed August 11, 1993.

The remaining issue before the Court is whether or not the FEC's final agency action—which determined that AIPAC is not a "political committee" as defined by 2 U.S.C. § 431(4)A of the Federal Election Campaign Act and therefore, is not subject to the registration and reporting requirements of 2 U.S.C. §§ 433 and 434—was arbitrary, capricious and contrary to law. Plaintiffs ask the Court to declare contrary to law the FEC's June 16, 1992 decision finding "no probable cause to believe" that AIPAC is a "political committee" as defined by 2 U.S.C. § 431(4)A. They urge the Court to remand this matter to the FEC and order the agency to revisit the question. *See*, Amended Complaint, at 14, filed December 21, 1992.

Plaintiffs argue four alternative grounds whereby the Court should enter summary judgment in their favor. Plaintiff's first three arguments attack the Commission's conclusion "that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities . . . constitute only a small portion of its overall activities and does not appear to be its major purpose." A.R. at 3772, General Counsel's Report, January 30, 1992. Plain-

tiffs argue that the Commission's "major purpose" standard:

1. is contrary to law;

2. departs without explanation from the agency's precedents;

3. is unclear; and the FEC's decision under the major purpose standard is not supported by sufficient findings and reasons.

In addition, plaintiffs contend that the Commission failed to conduct an adequate investigation of AIPAC's political activities.

The FEC challenges the plaintiffs' arguments by showing that the Commission's interpretations of the meaning of "political committee" under the Act and the "major purpose" standard as defined by *Buckley v. Valeo*, 424 U.S. 1 (1972), are proper. Furthermore, the FEC urges the Court to recognize the Commission's broad discretion in interpreting the Federal Election Campaign Act and find that the application of the "major purpose" standard to AIPAC and the facts of this case was precise. The FEC also argued that its investigation into AIPAC's expenditures and activities was wholly adequate. Defendant contends that the depth of the agency's investigation is within the exclusive arena of the FEC's prosecutorial discretion and deference to the agency "should be presumptively afforded." *Orloski v. FEC*, 795 F.2d 156, 164 (D.C.Cir. 1986) (citation omitted).

II. Legal Standard

a. "Political Committee" as defined by the Federal Election Campaign Act

A "political committee" is "any group of persons which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9) (A) (i). An expenditure is a "contribution" if it is made "with the cooperation or with the prior consent of, or in consultation with or at the request of suggestion of, a candidate." 11 C.F.R. § 109.1.

"When an organization qualifies as a political committee, pursuant to 2 U.S.C. § 431(4), the organization must register and file periodic reports of its receipts and disbursements with the Commission." A.R. at 2745; *See* 2 U.S.C. §§ 433 and 434. The reports must identify each individual who gives or receives from the political committee more than $200. *See* 2 U.S.C. § 434(b)(3)(A). Political committees are prohibited from contributing more than $1000 to any candidate, except that multicandidate political committees may contribute up to $5000. *See*, 2 U.S.C. § 441a(a). And, corporations are prohibited from making any contributions or expenditures "in connection with any election to any political office." 2 U.S.C. § 441b(a).

b. The "major purpose standard"

The classification of a group as a "political committee" is triggered by the amount of money it expends "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). An expendi-

ture in excess of $1000 activates the registration and reporting requirements of this Act. *See* 2 U.S.C. § 431(d). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court acknowledged the problem of applying this broad, vague definition to different kinds of groups involved in the political process. The Court cautioned that the definition of political committee "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. Subjecting issue groups to the restrictions of the Act, would fly in the face of its primary purpose, which is to "limit spending in federal election campaigns and to limit pernicious influence over candidates ... that wealthy individuals or corporations could achieve by financing the political war chests of those candidates." *Orloski*, 795 F.2d at 163 (citation omitted).

In *Buckley*, the Supreme Court acknowledged the efforts of the lower courts to "construe[] the words 'political committee' more narrowly." 424 U.S. at 79; *See, United States v. National Committee for Impeachment*, 409 F.2d 1135, 1141 (2nd Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041, 1057 (D.D.C. 1973). The *Buckley* Court fashioned its own definition—"To fulfill the purposes of the Act they [political committees] need only encompass organizations that are under the control of a candidate or **the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79** (emphasis added). "The narrowing construction given to the words 'political committee' by the lower courts which was endorsed in *Buckley*," has been used to determine whether or not organizations are "political committees" under the FECA. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C.Cir. 1981).

c. Standard of Review

A provision of the FECA allows parties to seek judicial review if the Commission dismisses a complaint or fails to act on a complaint filed within 120 days. *See* 2 U.S.C. § 437g(8)(A). The Court's task is to determine if the Commission's action was contrary to law. *See* 2 U.S.C. § 437g(8)(C). In *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981), the Supreme Court disagreed with the lower court's conclusion "that the Commission's construction of the Act was entitled to no deference whatsoever." 454 U.S. at 36-37. The Court acknowledged that "deference should presumptively be afforded" to the Commission. *Id.* at 37. In support of this conclusion, the Court highlighted Congress's intent to give the FEC administrative and enforcement responsibility, rulemaking and adjudicative powers, and power to make general policy decisions regarding the administration of the Act. *Id.*

In order for plaintiffs to prevail, they must show that the Commission acted in contravention of the Act. Plaintiffs carry the difficult burden of convincing the court that the Commission's interpretation of the Act was impermissible and contrary to law. Conversely, the defendant must show that the disposition of the administrative complaint by the agency was "sufficiently reasonable." *Id.* at 39. Because the standard of review is "highly deferential," the Court will presume that the agency action is valid, even if the Court would have interpreted the Act in a different manner. *See American Horse Protection Association, Inc. v. Yeutter*, 917 F.2d 594 (D.C. Cir. 1990). Therefore, the Court will examine the FEC's disposition of plaintiffs' administrative

complaint to determine if the Commission acted contrary to law when it found no probable cause to believe that AIPAC was a political committee within the meaning of the Act. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

III. Discussion

First, plaintiffs urge the Court to find that the defendant acted contrary to law in the disposition of the administrative complaint. Plaintiffs direct the Court to the "unambiguous language of the statute" and they argue that only the textual definition of political committee applies to the facts of this case. Plaintiffs' argument is based upon a single quantitative standard: if a group makes a contribution of [1000] $100 or more, that group is a political committee. *See* 2 U.S.C. § 431(4). Plaintiffs implore the Court to find the Commission's interpretation invalid, because the record shows that AIPAC's contributions were in excess of $1000.

As the Supreme Court made clear in *Buckley* and its progeny, the definition of "political committee" had to be narrowed to protect the constitutionality of the Act. Without the narrowing construction, the exercise of First Amendment rights, particularly the right of associational privacy, *NAACP v. Alabama*, 357 U.S. 449 (1958), was threatened. *See Buckley* 424 U.S. at 66. Therefore, this Court must consider the narrowing construction upon evaluating the statute and the Commission's interpretation of the statute.

Plaintiffs' argument that the Court should only look to the unambiguous text of the Act is inappropriate here. The Court must look beyond the statute to the case law in order to determine whether or not

AIPAC is a political committee under the FECA. Accordingly, the Court finds that plaintiffs' first argument fails to show that the Commission acted contrary to law because it went beyond the statute to narrow the textual definition of "political committee."

Second, plaintiffs argue that the Commission's application of the major purpose test is improper. Specifically, plaintiffs assert that not only is the Commission's application of the major purpose test unclear and insupportable, but it also departed from prior agency precedent without explanation. The plaintiffs argue that the major purpose of an organization's independent expenditures must be examined, as opposed to the major purpose of the organization itself.

The major dispute between the parties relates to the definition of political committee and the application of the major purpose standard. Congress intended to "address broadly the problem of political campaign financing," and wanted to "promote full disclosure of campaign-oriented spending" with the FECA. *Buckley*, 424 U.S. at 78. While the judiciary was in accord with this goal, the *Buckley* Court made clear that the Act was not contemplated "to reach groups engaged purely in issue discussion." *Id.* at 79. The courts had been concerned with the Act's broad, economic-based definition of political committee, because it is likely to include groups that were not meant to be subject to the restrictions of the Act.

Several early election law cases, including *Buckley*, were troubled by the Act's impact upon First Amendment issues. For example, some issue-oriented groups might be silenced by the burdensome requirements of the FECA at the same time that campaign-related groups were being regulated prop-

erly under the FECA. *See, e.g., United States v. National Committee for Impeachment*, 409 F.2d 1135 (2nd Cir. 1972) ("NCIF"); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973).

In an effort to protect the First Amendment rights of many groups that would come under the restrictions of the Act, the courts narrowed the definition of political committee, with the "major purpose" standard. This test was first articulated by the Second Circuit in *NCIF* and was later adopted by the United States District Court for the District of Columbia in *ACLU v. Jennings*. It reads as follows: "We also construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *NCIF*, 469 F.2d at 1141. The Court acknowledged that "under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal **or major purpose of the organizations** they seek to have comply with the Act." *Id.* at 1142 (emphasis added).

In their pleadings and at oral argument, plaintiffs argued that the major purpose test set forth in *NCIF* and *Jennings* focused on the major purpose of the expenditure, instead of the major purpose of the organization. They go on to assert that *Buckley* did not overrule those cases, and therefore, the analysis is still good law today. Plaintiffs accuse defendant of improperly applying this "major purpose" standard to AIPAC, the organization, as opposed to the expenditures made by AIPAC. Plaintiffs argue that this application of the major purpose standard is contrary to law.

Defendants argue that the major purpose standard as set forth in *Buckley* is clear: that the Supreme Court contemplated an analysis of the organization's major purpose, not the expenditure's major purpose. The Commission supports its assertions with recent and persuasive case law. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("MCFL"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C.Cir. 1981). In *MCFL*, the Supreme Court determined that a corporation's independent spending could not be subject to the restrictions of 2 U.S.C. § 441b if the corporation was formed for the express purpose of promoting political ideas, did not have shareholders, and was not established by a corporation or labor union. 479 U.S. at 264. The Supreme Court also made clear that if an organization's independent spending became so extensive that **the organization's major purpose** may be regarded as campaign activity, then it would be classified as political committee. *MCFL*, 479 U.S. at 262. (emphasis added). Defendant urges the Court to find that the Commission's consideration of AIPAC's major purpose—as an organization—was proper, according to Supreme Court precedent as set forth in *Buckley* and *MCFL*.

This Circuit applied the major purpose test to determine whether a "draft group", that is, an organization that seeks to encourage a specific candidate to run for office, is a political committee under the FECA. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C.Cir 1981). The court attempted, like those in *NCIF*, *Jennings* and *Buckley*, "to find a fair reading of the statute with comports with first amendment safeguards." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d at 393.

In *Machinists*, the court recognized the "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for Federal office." *Id.*

The court acknowledged that if the activities of an organization were "under the control of a candidate" or were "directly related to promoting or defeating" a candidate, then that organization would be a political committee under the FECA. The court held that the Machinists Non-Partisan Political League was not a political committee under the Act, because the group activities "did not support an existing 'candidate'." *Id.* at 396. The major purpose of the organization was to draft candidates, not to advance the election or defeat of a particular candidate for Federal office.

The plaintiffs' assertion that the case law requires this Court to examine the major purpose of an organization's expenditures to determine if that organization is a political committee appears to be supported by the *NCIF* case. In *NCIF* the court "construe[d] the Act to apply only to committees soliciting contributions or **making expenditures the major purpose of which is the nomination or election of candidates.**" 469 F.2d at 1141. (emphasis added). But, the court went on to reflect upon the ramifications of the major purpose test, and acknowledged that the major purpose test will be burdensome on the administrators of the Act, because they "will be forced to **glean the principal or major purpose of the organizations** they seek to have comply with the Act." *Id.* at 1142. (emphasis added). It is clear from the language of *NCIF*, and the case law that interpreted the "major purpose" test thereafter, that the test applies to the

organizations which may be subject to the reporting and disclosure requirements of the FECA, and not to the expenditures made by them.

The Court finds that the "major purpose" test as first articulated by the Second Circuit, and endorsed by the Supreme Court in *Buckley* was interpreted properly by the defendant FEC. The plaintiffs' assertion that the case law requires the Court to examine the major purpose of an organization's expenditure to determine if that organization is a political committee is erroneous. Under these circumstances, the Court must defer to the agency action and uphold the commission's analysis and application of the Act.

The Court's next step is to determine whether or not the Commission's application of the major purpose test, and its determination that AIPAC is not a political committee under the FECA was contrary to law. The FEC implemented an extensive investigation, and developed a substantial administrative record which documents AIPAC's political interests, finances and campaign-related activities. AIPAC was incorporated in 1963, as a non-profit organization. A.R. at 1469. Its sole function, as a registered domestic lobby, is to encourage close U.S.-Israel relations and to provide service to its own members. *Id.*

The Commission made the determination that "AIPAC's campaign-related expenditures, while likely to have exceeded $1,000 in some years, were not its major purpose but were made as an adjunct to, and in support of, the lobbying efforts that were the organization's primary focus." A.R. at 3772. Accordingly, the Commission found no probable cause to believe that AIPAC was in violation of sections 433 and 434 of the FECA. A.R. at 3871-3872.

The Court has reviewed the administrative record, and the legal arguments presented by the parties. The Court finds that the Commission interpreted properly the statutory definition of "political committee" and the "major purpose" test. The Court is convinced that the Commission's application of the major purpose test to the facts presented in the administrative complaint, regarding AIPAC's campaign-related activities was reasonable. The Court is mindful of the deference which should presumptively be afforded to this agency. *See Orloski* at 164.

In their last argument, plaintiffs attempt to show that the Commission failed to conduct an adequate inquiry or investigation into the facts which support their administrative complaint. Defendant claims that the investigation was wholly adequate and that the extent of their investigations should be left to agency discretion. The Court has reviewed the administrative record in this case. Its pages number almost four thousand. The two General Counsel Reports are thoughtful and well-reasoned. There is no evidence that the Commission failed to investigate adequately the plaintiffs' administrative complaint.

IV. Conclusion

The Court finds that the plaintiffs failed to show that the Commission's disposition of their administrative complaint was arbitrary, capricious and contrary to law. Therefore, the plaintiffs' motion for summary judgment and declaratory relief is denied. Because the Court finds that the Commission acted in a reasonable manner in its interpretation and application of the Federal Election Campaign Act as to the administrative complaint filed by the plaintiffs, the defendant's Motion for Summary Judgment is

granted, pursuant to Federal Rule of Civil Procedure 56(a).

/s/ JUNE L. GREEN
JUNE L. GREEN
U.S. District Judge

Dated: March 30, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (JLG)

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Mar. 30, 1994]

ORDER

Upon consideration of the cross-motions for summary judgment filed by the parties in the above-captioned case, the oral arguments presented to the Court and the entire record herein, it is by the Court this 30th day of March 1994 hereby

ORDERED that plaintiffs' Motion for Summary Judgment is denied; it is further

ORDERED that defendant's Motion for Summary Judgment is granted; and, it is further

ORDERED that the above-captioned case is dismissed with prejudice.

/s/ JUNE L. GREEN
JUNE L. GREEN
U.S. District Judge

APPENDIX E

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2804

IN THE MATTER OF AMERICAN ISRAEL
PUBLIC AFFAIRS COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on June 16, 1992, do hereby certify that the Commission took the following actions with respect to MUR 2804:

1. Decided by a vote of 6-0 to find no probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434.

   Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

2. Decided by a vote of 4-2 to find probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b, but take no further action.

   Commissioners McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision; Commissioners Aikens and Elliott dissented.

3. Decided by a vote of 6-0 to

a) Close the file in this matter.

b) Direct the Office of General Counsel to send appropriate letters pursuant to the actions noted above.

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

Attest:

6-17-92
Date

/s/ MARJORIE W. EMMONS
MARJORIE W. EMMONS
Secretary of the
Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2804

IN THE MATTER OF AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE

STATEMENT OF REASONS

On June 9 and 16, 1992, the Federal Election Commission ("Commission") considered the General Counsel's recommendations in MUR 2804 to find probable cause to believe that the American Israel Public Affairs Committee ("AIPAC") violated 2 U.S.C. § 441b and to approve a proposed conciliation agreement.

The General Counsel's May 29, 1992 Report maintained that AIPAC had violated Section 441b by making contributions to or expenditures on behalf of federal candidates in the form of communications to a group of persons that AIPAC considered its members. The General Counsel concluded that this group of persons did not meet the Commission's membership requirements for purposes of the Federal Election Campaign Act of 1971, as amended ("the Act"). In interpreting and applying the decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("NRWC"), and subsequent Commission advisory opinions, the General Counsel concluded that the group of persons AIPAC claimed as its members lacked a sufficient right to participate in the governance of the organization to meet the Commission's membership criteria. The General Counsel principally cited the fact that group members at issue here

had no right to vote for the governing body (the Executive Committee) of AIPAC. The General Counsel acknowledged that those members of AIPAC who attended the annual Policy Conference, only a small percentage of the total "members", could vote on the Policy Statement. He concluded however, that this right without more did not meet the Commission's criteria for voting rights or organizational attachment, though he recognized this situation presented a close question. In opposition to the General Counsel's position, AIPAC strenuously argued that it constitutes the quintessential membership organization established to support a particular idea or purpose and that the General Counsel was being unnecessarily rigid in applying the NRWC decision and Commission advisory opinions.

We agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria as provided in a series of advisory opinions following the NRWC decision. Thus, we found probable cause to believe AIPAC violated 2 U.S.C. § 441b. We also agreed with the General Counsel that the AIPAC situation presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the organization came close to meeting the "spirit" of the Commission's membership criteria, but failed on a specific point.

Accordingly, given the facts of this case, we decided to exercise our prosecutorial discretion, *see*, *Heckler v. Chaney*, 470 U.S. 821 (1985), and to take no further action with respect to the finding on Section 441b.[2]

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[2] To the extent that any of the violations of Section 441b outlined by the General Counsel in his brief and report are not dependent on the membership issue, we concluded that such instances, i.e., distributing candidate position papers or suggesting to candidate fundraisers who to contact, did not warrant further pursuit since the record did not reflect that these were significant violations.

We emphasize that the circumstances of this decision not to proceed against an organization failing to meet the Commission's definition of membership are narrow. Further we anticipate the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements.

27 July 1992 — Date
/s/ SCOTT E. THOMAS
SCOTT E. THOMAS
Vice Chairman

27 July 1992 — Date
/s/ JOHN WARREN MCGARRY
JOHN WARREN MCGARRY
Commissioner

27 July 1992 — Date
/s/ DANNY LEE MCDONALD
DANNY LEE MCDONALD
Commissioner

27 July 1992 — Date
/s/ TREVOR POTTER
TREVOR POTTER
Commissioner